

IN THE  
**Supreme Court of the United States**  
October Term, 1977

Supreme Court, U. S.

FILED

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**No. 77-935**

HELENE CURTIS INDUSTRIES, INC.,  
*Petitioner,*

*vs.*

CHURCH & DWIGHT CO., INC., and  
ALLIED CHEMICAL CORPORATION,  
*Respondents.*

CHURCH & DWIGHT CO., INC.,  
*Respondent,*

*vs.*

HELENE CURTIS INDUSTRIES, INC., and  
N. W. AYER & SON, INCORPORATED,  
*Petitioners.*

(Consolidated Causes)

**BRIEF OF RESPONDENT CHURCH & DWIGHT  
CO., INC. IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

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**BRIEF OF RESPONDENT CHURCH & DWIGHT  
CO., INC. IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

The petition presents no special or important reason the writ should be granted. There is no conflict between



the decisions of any Courts of Appeals. There is no Federal question which has been decided in a way in conflict with any decision of this Court. And there has been no departure from the accepted and usual course of judicial proceedings. This is a straightforward trademark infringement suit in which the District Court and the unanimous Court of Appeals for the Seventh Circuit concurred in finding that petitioner Curtis willfully adopted, used and expanded its ARM IN ARM With Baking Soda mark in order "to derive benefit from confusion caused by ARM IN ARM to take advantage of goodwill previously established by plaintiff for its Arm & Hammer product", and concurred in holding that temporary injunctive relief against the infringing mark is needed to prevent deception of consumers and irreparable injury to respondent. The Court of Appeals rightly decided that the award of temporary injunctive relief is warranted by "ample evidence", and is a proper exercise of the District Court's discretion. There is no sound reason this Court should grant the writ.

### Opinions Below

The February 25, 1976 opinion of the District Court for the Western District of New York granting respondent Church & Dwight's Rule 42(b) motion for separate trial of the trademark infringement and unfair competition issues is not reported (Pet.App. 98). The April 15, 1976 opinion of the Western New York District Court denying rehearing and refusing to certify for appeal the question of the propriety of the Court's Order for separate trial is not reported and is not included in petitioner's appendix (it is reproduced in respondent's appendix, *infra*, p. 1a).

The *per curiam* opinion of the Court of Appeals for the Second Circuit dismissing Curtis' petition for a writ of mandamus to review the propriety of the trial court's Rule 42(b) Order is not reported and is not included in petitioner's appendix (it is reproduced in respondent's appendix, *infra*, p. 2a). The December 13, 1976 dismissal under this Court's Rule 60 of Curtis' earlier petition for writ of certiorari to review the Second Circuit Court of Appeals' refusal to disturb the trial Court's Rule 42(b) Order is reported at 429 U.S. 1011, 97 S.Ct. 655, and is not included in petitioner's appendix (it is reproduced in respondent's appendix, *infra*, p. 3a).

The January 18, 1977 Opinion, Findings of Fact and Conclusions of Law of the Northern Illinois District Court (McGarr, J.) granting respondent Church & Dwight *pendente lite* injunctive relief against Curtis' acts of trademark infringement and unfair competition, are reported in part (omitting all of Findings 7-69 on the trademark issues) at 1977-1 Trade Cases ¶61,278 and are reproduced in full text at Pet.App. 104-122. The Illinois District Court's January 24, 1977 preliminary injunction Order is not reported (Pet.App. 103). The August 17, 1977 affirming opinion of the Court of Appeals for the Seventh Circuit is reported at 560 F.2d 1325 (Pet.App. 1-19). The Court's October 11, 1977 Order amending the August 17, 1977 opinion is not reported and is not included in petitioner's appendix (it is reproduced in respondent's appendix, *infra*, p. 4a).

### Statement

Petitioner Curtis' statement of the case is incomplete, inaccurate and conspicuously silent as to the concurrent findings of fact of the District Court and the unanimous Court of Appeals, based on abundant proofs in Curtis' own records, which establish that:

(1) "'Curtis purposefully chose a confusingly similar and infringing trademark for the reason that Arm in Arm readily produces in consumers' minds the image of Arm & Hammer Baking Soda'." (CA Opinion, Pet.App. 7; F/F 22, 67, Pet.App. 108, 120);

(2) Curtis' choice of ARM IN ARM has caused widespread, actual public confusion involving ARM IN ARM with Baking Soda products and ARM & HAMMER Baking Soda products (CA Opinion, Pet.App. 6-7; F/F 41-47; Pet.App. 113-116), *e.g.*, Curtis' own records of its marketing research tests of three ARM IN ARM TV commercials, conducted during the pendency of this lawsuit, show that "290 out of 998 consumers interviewed who saw the commercials thought Arm in Arm was made by Arm & Hammer while only 276 believed it was made by Curtis (Finding 46)." (CA Opinion, Pet.App. 6; F/F 46, Pet.App. 115); and

(3) "Curtis' continuation and expansion of its Arm in Arm marketing activities, in spite of evidence of confusion revealed by its own research, made clear that 'Curtis intended to derive benefit from confusion caused by Arm in Arm to take advantage of goodwill previously established by plaintiff for its Arm & Hammer products'. (Finding 68.)" (CA Opinion, Pet.App. 7; F/F 68, Pet.App. 120).

After carefully assessing "each of the factors to be weighed in determining the propriety of the injunction" and finding "ample evidence" to warrant temporary injunctive relief, the Court of Appeals endorsed the District Court's determination that such relief is needed in order to prevent irreparable injury to respondent and to safeguard the "paramount" interests of the consuming public in being protected against confusion, mistake and deception (CA Opinion, Pet.App. 4-12; F/F 56-63, Pet.App. 118-119).

It is in the context of the foregoing affirmed findings as to the "multiple examples of actual public confusion" (CA Opinion, Pet.App. 6) being caused by "Curtis' willful use of an infringing trademark" (CA Opinion, Pet.App. 11)—facts which the petition totally ignores—that the Court of Appeals likewise approved the District Court's ruling that the antitrust defenses and counterclaims as pleaded by petitioner are not of "sufficient merit or relevance" to bar entry of needed preliminary injunctive relief (CA Opinion, Pet.App. 19 n.14). Against that background the Court of Appeals noted first that "Curtis' antitrust claims are remote and ill-founded" (CA Opinion, Pet.App. 7-8) and later that:

"[T]he allegations of its affirmative defense concern marketing violations involving the baking soda market, rather than misuse of the Arm & Hammer trademark itself. The district court considered the antitrust counterclaim and concluded that the plaintiff had made a case for a preliminary injunction 'independently of the antitrust counterclaim, and despite it.'" (footnotes omitted) (CA Opinion, Pet.App. 18-19)

Amplifying this point, the Court of Appeals quoted with approval the District Judge's observation that "Curtis

'could market a baking soda deodorant, advertise the baking soda aspect of it all they want, as long as they eliminate the problem that arises basically from the use of the word "Arm" ' ' ' (CA Opinion, Pet.App. 18, n.13).

The District Court's Finding 66 likewise makes clear that the preliminary injunction imposes no restriction whatsoever on Curtis' marketing any baking soda product under a non-deceptive brand name:

"Defendant Curtis will not be foreclosed by a preliminary injunction from competing with plaintiff's Arm & Hammer Baking Soda personal deodorants. Rather, Curtis will be able to compete with plaintiff through advertising, promotion and sale of its Baking Soda personal deodorants under non-deceptive trademarks." (F/F 66, Pet.App. 120)

In that total context the unanimous Court of Appeals agreed with the District Court's determination that the antitrust arguments renewed in Curtis' present petition are too "remote and unrelated" to the issues of trademark infringement and unfair competition to bar the temporary injunctive relief which the affirmed findings of fact have established to be urgently needed:

"In light of the limited applicability and viability of antitrust defenses to trademark infringement claims and in light of the questionable legal sufficiency of Curtis' allegations of antitrust violations, we find the antitrust defense to be remote and unrelated to the issues on this appeal." (CA Opinion, Pet.App. 19)

Although all of the asserted grounds for the petition revolve around Curtis' "antitrust issues", the petition fails to mention that all of its antitrust theories and its conten-

tions concerning the Rule 42(b) Order have been repeatedly raised without success before the trial and appellate courts in the Second Circuit, as well as the trial and appellate courts in the Seventh Circuit.

Prior to transfer of the case from New York to Illinois, Curtis sought certification, petitioned the Court of Appeals for the Second Circuit for a writ of mandamus, and sought a writ of certiorari from this Court in respect of the same unappealable, discretionary Rule 42(b) Order that is again challenged in its present petition. The arguments were renewed without success before the Illinois District Court after transfer, and they were once again advanced by Curtis and rejected by the Seventh Circuit Court of Appeals' decision which is the subject of its present petition.

Curtis has failed to persuade any of the eight judges of the four trial and appellate courts that have passed on its antitrust theories, either that its antitrust defense has any substance or that the trial court's routine administration of Rule 42(b) to order separate trial of the trademark issues in advance of the "antitrust issues" was an abuse of discretion.

### Questions Presented

One reading Curtis' petition would hardly know that this is a trademark infringement action in which the District Court and the Court of Appeals have in the strongest of terms condemned Curtis as a purposeful infringer. The petition nowhere challenges the affirmed findings of fact (1) that Curtis adopted, used and expanded its ARM IN ARM With Baking Soda mark with the deliberate purpose of



trading on the reputation of Church & Dwight's "famous" ARM & HAMMER mark, (2) that actual public confusion involving ARM IN ARM and ARM & HAMMER is widespread among both consumers and the trade, and (3) that as a consequence Church & Dwight is suffering irreparable injury and the consuming public is being deceived.

Since Curtis has no grounds upon which to attack directly either the facts or the law supporting the affirmed injunctive order, it is relegated to collateral grounds—the supposed abuse of discretion and error in the four trial and appellate courts' rulings on the antitrust issues which are challenged in its "Questions Presented". Whatever the decision on the collateral questions, there remains an imperative need for preliminary injunctive relief to maintain the *status quo ante* and protect the consuming public on the unchallenged grounds that support the grant of such injunctive relief.

## ARGUMENT

### Questions 1-4 and 6

Questions 1-4 and 6 of Curtis' "Questions Presented" all involve its so-called antitrust defense in one form or another. In spite of its rhetorical variations on this theme, Curtis' petition claims no more than that its introduction and perpetuation of an antitrust bogey man in the case insulates it from interim injunctive relief to which Church & Dwight otherwise would be entitled.

Thus, Question 1 in Curtis' petition claims that the unanimous Court of Appeals for the Seventh Circuit and the Northern Illinois District Court erred in granting preliminary injunctive relief against Curtis' continued acts of deliberate trademark infringement because Curtis allegedly

pleaded and submitted supposed evidence that Church & Dwight has used its ARM & HAMMER trademark in violation of the antitrust laws.

This question presents no reason the writ should be granted. Indeed, the notion that one's merely pleading a defense and submitting supposed evidence without more precludes preliminary injunctive relief would not only read Rule 65(a) out of the Federal Rules of Civil Procedure, it would also strip district courts of the discretion that this Court has mandated that they exercise in preliminary injunction cases. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). And Curtis' suggestion (Pet. 24) that a court must enter separate findings as to each defense that is raised, no matter how trivial or insubstantial, is utterly without support.\*

\* Curtis also plays fast and loose in its characterization of the "evidence" that purportedly supports its antitrust defense. For example, with respect to Church & Dwight's actions concerning Colgate's Peak toothpaste which contains baking soda (Pet. 21, n.13; 23-24), the uncontroverted record evidence shows that Church & Dwight protested Colgate's use of a semi-circular design which simulated the circular logo of the ARM & HAMMER design mark. Colgate acquiesced and eliminated the confusingly similar feature, thereby ending the matter. No further protest was made, and Colgate has subsequently continued to sell Peak toothpaste with baking soda in a non-confusing package (*infra*, pp. 23a-27a). Moreover, the suggestion of impropriety in relation to Church & Dwight's response to Johnson & Johnson's competitive Shower to Shower baking soda deodorant (Pet. 21, n.13, 23-24) must fail in the face of evidence that Curtis itself contemplated a similar competitive response (*infra*, pp. 32a-34a).

So too Curtis' charge that Church & Dwight's ARM & HAMMER personal deodorant product was prompted by its own ARM IN ARM with baking soda deodorant is wholly at variance with the undisputed evidence that Church & Dwight had been at work on its baking soda-containing personal deodorant since 1973, well prior to the introduction of Curtis' product in 1975 (F/F 16, 26, Pet.App. 107, 110).

Curtis' complaints (Pet. 4, 9, 24) concerning the alleged delay in bringing on the preliminary injunction motion conveniently ignore the Court of Appeals' affirmation of the District Court's findings and conclusions that Church & Dwight has not been guilty of laches (CA Opinion, Pet.App. 12-14; F/F 51-63, C/L 3, Pet.App. 117-119, 122).



One fundamental flaw in Curtis' defense is that its anti-trust allegations on their face are remote and unrelated to the infringement that has occurred. Curtis bottoms its claims on alleged monopoly in the consumer baking soda market, asserting illegal "marketing practices and pricing practices", and assuming without more that the single product, baking soda, is a relevant market (Complaint ¶11 in Civil Action No. 76 C 2235, *infra*, p. 13a).<sup>\*</sup> Such antitrust allegations are plainly insufficient to bar recovery for trademark infringement, as is made clear by the pertinent authorities. Thus, in *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 298 F. Supp. 1309, 1311-12 (S.D.N.Y. 1969), *aff'd as modified*, 433 F. 2d 686 (2 Cir. 1970), *cert. denied*, 403 U.S. 905 (1971), the Court found the alleged antitrust activities (price maintenance, resale restrictions, tying, price discrimination, and the like) to be remote from the trademark infringement claim, and accordingly held that the defense had not been established. The similarity between *Zeiss* and this case could not be clearer.

The decision in *Coca-Cola Company v. Howard Johnson Company*, 386 F. Supp. 330 (N.D. Ga. 1974) is also directly in point. In that case, Howard Johnson sought to defend a trademark infringement suit by resort to antitrust defenses involving allegations that the plaintiff imposed territorial resale restrictions upon licensees. In granting plaintiff's motion to strike the antitrust defense, the Court stated:

"Merely because a plaintiff has violated the anti-trust laws, or any other laws, in some matter complete-

<sup>\*</sup> Church & Dwight has denied Curtis' allegation, repeated *ad nauseam* throughout its pleadings and the petition, that Church & Dwight possesses "100% of the consumer market for baking soda" (Ans. in Civil Action No. 76 C 2235, *infra*, pp. 6a-18a). In any event, a market share, however large, is not without more an illegal marketing or pricing practice.

ly unrelated to the case before the Court does not result in 'unclean hands' on plaintiff's part. There must be some logical connection between the right plaintiff asserts and the activity constituting unclean hands. Otherwise, the courts must be willing to serve as a battleground for extensive antitrust litigation whenever a trademark holder seeks any, totally unrelated, equitable relief.

• • •

"To bring the purported antitrust violation into the action would obfuscate the issues and convert a relatively straightforward trademark infringement case into a complex antitrust case. The Court thinks defendant's fifth defense is clearly insufficient." (386 F. Supp. at 337-38; emphasis supplied).

The courts are unanimous in requiring that a mark be the direct instrument of alleged illegality before antitrust considerations may even be raised. Plainly, Curtis' complaints about alleged baking soda monopolization and marketing and pricing activities are so tangential and remote as to fail the test. And, its incantation "powerful anti-competitive device" in the petition and its other pleadings (*e.g.*, Pet. 12; Pet. App. 77, 79, 83, 85, 86) does nothing to alter this conclusion and is wholly inconsistent with the cases pointing out that by their very nature trademarks are not powerful anti-competitive devices.<sup>\*</sup>

<sup>\*</sup> Curtis' antitrust cases do not support its application of the law to the facts of this case. It has been able to do no better than to cite distinguishable cases such as a patent-antitrust case (*Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488 (1942)), Clayton Act merger cases (*Ford Motor Co. v. United States*, 405 U.S. 562 (1972) and *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967)), and a motion picture theatre monopolization case (*United States v. Griffith*, 334 U.S. 100 (1948)). Even *Timken Co. v. United States*, 341 U.S. 593

(footnote continued on next page)

Stripped of its allegations concerning the consumer baking soda market, Curtis is left with the astounding claim that Church & Dwight has monopolized or is attempting to monopolize the deodorant and antiperspirant market in which Church & Dwight holds a 2% market share (Stanier, *infra*, p. 22a). Plainly, such an allegation is not even worthy of serious consideration.

Curtis is thus reduced to the core of its original antitrust claim filed in July 1975, namely that this suit was brought in bad faith, a contention fully met by the District Court's affirmed conclusion that the suit was "a good faith effort to protect [Church & Dwight's] rights in the ARM & HAMMER trademarks and to prevent confusion, mistake and deception of consumers as to the source of Arm in Arm With Baking Soda deodorants" (C/L 5, Pet.App. 122).

The Court of Appeals was on sound ground indeed in affirming the District Court's decision to disregard the antitrust defense because it was "remote and unrelated to the issues on this appeal" (CA Opinion, Pet.App. 19).

In view of the foregoing, Curtis' Question 6 (claiming error in the Court of Appeals' determination that its defense was "remote and unrelated" and of "questionable legal sufficiency") is also insubstantial and likewise provides no basis for granting the writ.

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(1951), involved a massive, worldwide, multiparty division of the markets in which the trademark was but one part.

Curtis' reliance on the initial decision by a Federal Trade Commission Administrative Law Judge in *In the Matter of Borden, Inc.*, Docket #8978 (F.T.C. August 19, 1976) (the "RealLemon" case), is even more misplaced. That decision did not involve trademark infringement or other trademark enforcement activities, much less the question whether antitrust violations of the type found by the Administrative Law Judge would be appropriate defenses in a trademark infringement suit.

Curtis' second and third questions involve the issue (irrelevant on the facts of this case) of the scope and effect of an antitrust defense in a trademark infringement action. Even if in an appropriate case an antitrust violation might be a complete defense to an infringement claim as Curtis contends, the remote and unrelated nature of Curtis' antitrust allegations here makes that issue one of purely academic concern and hence does not support issuance of the writ.

In any event, it is plain that allegations of antitrust violation are not a general trademark infringement defense. As stated in *Ceramco, Inc. v. Lee Pharmaceuticals*, 1976-1 Trade Cas. ¶60, 815 (E.D.N.Y. 1976):

"The antitrust laws, 15 U.S.C. §§1 to 7, do not prohibit monopolies that result from the legitimate use of a trademark. (Citing cases). That plaintiffs have violated the antitrust laws is no answer to a claim of trademark infringement. *O. & W. Thum Co. v. Dickinson*, 245 F. 609 (6th Cir. 1917), cert. denied, 246 U.S. 664, 38 S. Ct. 334 (1918)."

A claim that The Seven-Up Company was monopolizing the word "up" (a claim identical to Curtis' claim that Church & Dwight has monopolized the word "arm") was similarly dismissed in *Seven-Up Co. v. No-Cal Corp.*, 183 USPQ 165, 166 (E.D.N.Y. 1974), holding that:

"Since trademarks, unlike patents, give one a right to use a particular designation, and do not give a monopoly on a product, a claim of an attempt to create a monopoly by the use of a trademark is insufficient. *Goldstein v. General Electric Co.*, 264 F. Supp. 403, 153 U.S.P.Q. 334 (S.D.N.Y. 1967)

• • •

"Since all that is required of a defendant in order to escape the clutches of an alleged trademark monop-



oly is to market his product under a different name, the damages which may flow from a trademark infringement action cannot support an antitrust counterclaim.”\*

Use of a trademark in violation of the antitrust laws may under certain circumstances be a defense to the incontestability of the mark under Section 33(b)(7) of the Lanham Act (15 U.S.C. §1115(b)(7)). According to Section 33(b) an incontestable registration “shall be conclusive evidence of the registrant’s exclusive right to use the registered mark in commerce. . . .” The “defenses or defects” specifically enumerated in Section 33(b) merely act to defeat the conclusiveness of the presumption that would otherwise attach to the registration, and may not be used to preclude enforcement of a mark independently shown to be valid and infringed.

Exhaustive consideration of the legislative history led Judge Mansfield in *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra*, to conclude that:

“Both the express language of §33(b)(7) of the Lanham Act and its legislative history reveal strong support for plaintiffs’ contention that the intent and effect of the Act is merely to make the defense of antitrust misuse available to defeat the conclusive evidentiary force that would otherwise attach to a trademark certificate under the Act.” (298 F. Supp. at 1311-12)

Thus, even if Curtis were able to substantiate its extraordinary antitrust allegations, they would *not* constitute

\* The District Court took note of the same point when he observed that Helene Curtis “could market a baking soda deodorant, advertise the baking soda aspect of it all they want, as long as they eliminate the problem that arises basically from the use of the word ‘Arm’” (*infra*, p. 21a).

a complete defense in any sense of the word. As such, Curtis cannot be heard to suggest that entry of the preliminary injunction was in error.

Moreover, it has been repeatedly held that only a few antitrust allegations even qualify for the narrow purpose of Section 33(b). Judge Mansfield noted that the “forces favoring exercise of such power in a trademark suit are much weaker than those calling for its exercise in patent litigation, and that decisions upholding an antitrust misuse defense in the latter are not necessarily authoritative in the trademark field” (*id.* at 1314). After reemphasizing the “sharp distinction” between patent and trademark misuse cases, he noted:

“... it is significant that in almost every reported instance where the antitrust misuse of a trademark has been raised as a defense, it has been rejected.” (*id.*)

And he concluded that:

“An essential element of the antitrust misuse defense in a trademark case is proof that the mark itself has been the basic and fundamental vehicle required and used to accomplish the violation.” (*id.* at 1315)

The Court of Appeals for the Seventh Circuit expressed its emphatic agreement with Judge Mansfield in *Union Carbide Corporation v. Ever-Ready Inc.*, 531 F. 2d 366 (7 Cir. 1976), *cert. denied*, 429 U.S. 830 (1976), stating:

“... that the burden of such proof is a heavy one on the proponent of the issue and that the forces favoring the defense are much weaker than in patent cases which involve by their very nature a monopoly situation.” (*id.* at 389)



The Courts below thus dealt properly with Curtis' anti-trust claims. Contrary to its assertion in its Question 4, that its antitrust defense was not considered during the Court's determination of the likelihood that Church & Dwight would succeed on the merits of its infringement claim, it is clear that the Court of Appeals specifically considered the antitrust defense in just that context:

"Curtis argues that any confusion which may be shown is caused not by its selection of the Arm in Arm trademark, but by Church & Dwight's misuse of its Arm & Hammer trademark in violation of the antitrust laws. *However, as will be discussed in greater detail infra, Curtis' antitrust claims are remote and ill-founded. It is clear from the record that public confusion is the result of Curtis' choice of a trademark infringingly similar to Arm & Hammer.*" (CA Opinion, Pet. App. 7-8; emphasis supplied)

In sum, the antitrust issues that Curtis has sought to introduce into this case are insubstantial and provide no basis in law or in fact for avoiding the preliminary injunctive relief that the equities and public interest have been held to require.

#### Questions 5, 7, 8(a)

These three questions reiterate in variant forms the same supposed error by the Court of Appeals in approving the grant of *pendente lite* injunctive relief against Curtis' continued acts of trademark infringement, while rejecting Curtis' contention that the New York District Court abused its discretion by entering a Rule 42(b) Order staying proceedings on Curtis' antitrust defenses and counterclaims until after a determination of the trademark issues.

The Court of Appeals properly found that the trial Court did not abuse its discretion in entering the Rule 42(b) Order. Curtis' Questions 5, 7 and 8(a) pose the same grounds of attack on the trial judge's discretionary control of his docket which eight judges of the trial and appellate courts in the Second and Seventh Circuits have rejected *in toto*.

The knee-jerk reaction of trademark and patent defendants who seek to absolve their guilt by raising broad allegations of antitrust violations was the subject of comment in the *Report of The Attorney General's National Committee to Study the Antitrust Laws* 249 (1955), which recommended separation of antitrust and patent issues for trial purposes under Rule 42(b). The recommended procedure has been followed in numerous cases in which trial Courts have separated proprietary rights and antitrust issues.\*

Pertinent factors that have been considered in making such rulings have included the differences in proofs to be adduced on the trademark and antitrust issues; the fact that resolution of the trademark issues could obviate the need for any discovery or trial of the antitrust issues; the fact

\* See, *Union Carbide Corp. v. Ever-Ready Inc.*, 392 F.Supp. 280, 283 (N.D.Ill. 1975), *rev'd on other grounds* 531 F.2d 366 (7th Cir. 1976) (trademark infringement case); *Components, Inc. v. Western Electric Company*, 318 F.Supp. 959, 967 (D.Me. 1970); *Metal Film Company v. Metlon Corporation*, 272 F.Supp. 64, 65 (S.D.N.Y. 1967); *Transmirra Products Corp. v. Monsanto Chemical Co.*, 27 F.R.D. 482, 483 (S.D.N.Y. 1961); *Smith, Kline & French Lab. v. International Pharm. Labs.*, 98 F.Supp. 899, 901 (E.D.N.Y. 1951) (unfair competition case); *Forstmann Woolen Co. v. Murray Sices Corporation*, 10 F.R.D. 367, 372 (S.D.N.Y. 1950) (trademark and copyright infringement case); *Henan Oil Tools, Inc. v. Engineering Enterprises, Inc.*, 262 F.Supp. 629, 631-632 (S.D.Tex. 1966); *Fischer & Porter Company v. Sheffield Corporation*, 31 F.R.D. 534, 535, 539-540 (D.Del. 1962).

that separate trials will be more economical and will involve a swifter resolution of the trademark issues and the consequent advancement of the public interest; and the fact that the public has a right not to be deceived. All of the foregoing important factors favoring separate, early trial of the trademark issues support the propriety of the Rule 42(b) Order here, as shown in the passage of the New York District Court's decision which the Court of Appeals quoted in finding that the trial Court did not abuse its discretion in entering the Order (Pet.App. 15-16).

Moreover, Curtis is in no position to claim prejudice as a result of the Rule 42(b) separation of issues. That is because Curtis' antitrust allegations as a matter of law are not a general defense to a trademark infringement claim (*supra*, pp. 13-16), and such allegations provide no basis for refusing the temporary injunctive relief so vital to trademark owners and the consuming public.

Curtis' claim of supposed prejudice is that the District Court's Conclusion 4 (which states that none of the evidence shows that the confusion flows from monopolization or attempted monopolization) is erroneous because the Rule 42(b) Order precluded it from developing evidence to try to overcome the proofs in its own contemporaneous records that confusion was the intended result of Curtis' deliberate choice of "a confusingly similar and infringing trademark" in order "to take advantage of goodwill previously established by plaintiff for its Arm & Hammer products" (F/F 22, 67, 68, Pet.App. 108, 120; CA Opinion, Pet.App. 7). However, Curtis nowhere explains how the fishing expedition it proposes to conduct in relation to Church & Dwight's consumer baking soda business would have any bearing on

the determination of the causes of the massive outpouring of confusion that has occurred in the deodorant and antiperspirant market. In any case, confusion and its causes are trademark issues, and thus the Rule 42(b) Order can hardly have impeded petitioner's efforts. Rather, the insurmountable hurdle Curtis has had to contend with is the knowledge possessed by its top management since the inception of this dispute that the confusion has been caused by its own "willful use of an infringing trademark" (CA Opinion, Pet.App. 11). As the Court of Appeals stated in rejecting the contentions renewed again in the present petition:

"It is clear from the record that public confusion is the result of Curtis' choice of a trademark infringingly similar to Arm & Hammer." (CA Opinion, Pet.App. 8)

2. Under Question 8(a) Curtis also argues that the Court of Appeals' approval of *pendente lite* injunctive relief against Curtis' continuing its deliberate trademark infringement, while refusing to reverse the trial Court's Order staying proceedings on the antitrust defense until after a determination of the trademark issues, violates Curtis' Constitutional rights under the Fifth Amendment to due process of law (Pet. 26).

No such question arises. The claimed violation of Fifth Amendment rights is frivolous. Curtis' "due process" argument posits a Constitutional right to raise every defense in a single proceeding, thereby endeavoring to read Rule 42(b) and its express authorization to separate issues out of the Federal Rules of Civil Procedure. The simple answer given by both the New York District Court (Pet.



App. 99) and the Seventh Circuit Court of Appeals (Pet. App. 16) is that Curtis will have its day in court in due course and that it will be able to raise its antitrust claims for whatever they are worth. But there is nothing in the Constitution that precludes a trial judge from making a reasonable discretionary procedural ruling as to when that day might be. And there is no basis in authority or in reason for petitioner's contention that the pleading of its antitrust issues and the unvacated Rule 42(b) Order pose a Constitutional "due process" bar to the trial Court's discretionary award of needed temporary injunctive relief against "willful use of an infringing trademark" (CA Opinion, Pet.App. 11).

#### Question 8(b)

The petition states that the Seventh Circuit Court of Appeals erred in rejecting Curtis' contention that the Rule 42(b) Order for a separate trial of the "trademark issues" in advance of the antitrust issues, violates Curtis' Constitutional right under the Seventh Amendment to an "effective trial by jury" (Pet. 4).

No such question is involved. The claimed violation of Seventh Amendment rights is non-existent.

There is no Constitutional mandate that the same jury must try all issues raised by a complaint and by defenses and counterclaims. As stated in 9 Wright & Miller, *Federal Practice and Procedure: Civil* §2391, at 302 (1971):

"Is there a violation of the constitutional provision if issues are separately submitted to separate juries? The answer rather clearly must be in the negative,"

Curtis' supposed Constitutional requirement that the trademark issues and the antitrust issues must be tried together to the same jury, would render trial courts powerless to apply Rule 42(b) in jury cases. If anything, because of the inherent complexity of antitrust cases, there is more reasons to order separate trial of non-antitrust and antitrust issues in jury cases than in non-jury cases. *Shepard v. International Business Machines Corp.*, 45 F.R.D. 536, 537 (S.D.N.Y. 1968); *Reading Industries, Inc. v. Kennecott Copper Corporation*, 61 F.R.D. 662, 665 (S.D.N.Y. 1974).

The cases cited by Curtis are distinguishable. This is not a case like *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), where the issue of jury trial arose from an order directing that certain issues be tried to the Court without a jury; or like *Gasoline Prods. Co. v. Champlin Co.*, 283 U.S. 494 (1931), where questions of damages and liability were inextricably intertwined. Here, the New York trial Court found the antitrust issues to be fairly separable from the trademark issues. Curtis will have full opportunity to present such issues before a jury after determination of the trademark issues, if such a trial is warranted at that time.

#### Conclusion

Nowhere in its petition has Curtis demonstrated any substantial reason or basis for granting this writ. Not only has it failed to show that any error occurred in the proceedings below, it has not demonstrated that this case involves any of the considerations governing review on certiorari as outlined in Supreme Court Rule 19, 28 U.S.C.A. Thus, no conflict between circuits is alleged; no claim is made that the carefully considered concurrent decisions be-



low are in conflict with the applicable decisions of this Court; no important question of federal law is involved; there is no basis for exercising this Court's power of supervision; and the notion that a deliberate trademark infringer's efforts to avoid preliminary injunctive relief while it pursues a "remote and ill founded" antitrust defense requires intervention by this Court, is not even worthy of serious consideration.

The petition is without merit and should be denied.

Respectfully submitted,

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*Of Counsel:*

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**APPENDIX**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 75-184

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CHURCH & DWIGHT, Co.,

*Plaintiff,*

*vs.*

HELENE CURTIS INDUSTRIES, INC., and

ACHTER'S KEY DRUG, INC.,

*Defendants.*

---

On February 25, 1976 this court ordered a separate trial of the "trademark issues" in advance of a trial of the "antitrust issues" and a stay of proceedings on the "antitrust issues" until after a determination of the "trademark issues". This is a motion by defendants for an order for amendment of the order of February 25, 1976 to certify the order for appeal under 28 U.S.C. Section 1292(b). On due consideration it is hereby

ORDERED that the motion is in all respects denied.

/s/ HAROLD P. BURKE

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HAROLD P. BURKE  
United States District Judge

April 15, 1976.

76-3039

UNITED STATES COURT OF APPEALS  
Second Circuit

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HELENE CURTIS INDUSTRIES, INCORPORATED, and  
ACHTER'S KEY DRUG, INCORPORATED,  
*Petitioners,*

*vs.*

HONORABLE HAROLD P. BURKE, United States District Judge,  
for the Western District of New York, CHURCH & DWIGHT  
COMPANY, INC., and N. W. AYER & SON, INCORPORATED,  
*Respondents.*

CHURCH & DWIGHT CO. INC.,  
*Plaintiff,*

*vs.*

HELENE CURTIS INDUSTRIES, INC., and  
ACHTER'S KEY DRUG, INC.,  
*Defendants.*

---

A petition for a writ of mandamus having been filed and  
answering papers having been filed by the respondents  
Church & Dwight Company, Inc., and N. W. Ayer & Son,  
Incorporated,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is dismissed.

Further ordered that the clerk shall serve a copy of this  
order on the judge named respondent and on all other  
parties to the action in the trial court.

/s/ WALTER R. MANSFIELD  
Hon. Walter R. Mansfield, CJ

/s/ JAMES L. OAKES  
Hon. James L. Oakes, CJ

/s/ MURRAY I. GURFEIN  
Hon. Murray I. Gurfein, CJ

Dated: July 8, 1976.

December 13, 1976 Order of the Supreme Court  
of the United States (429 U.S. 1011)

DECEMBER 13, 1976

*Dismissal Under Rule 60*

No. 76-491. HELENE CURTIS INDUSTRIES, INC., ET AL. v.  
BURKE, U. S. DISTRICT JUDGE, ET AL. C. A. 2d Cir. Certio-  
rari dismissed under this Court's Rule 60.



## UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 11, 1977.

Before

HON. WILLIAM J. BAUER, Circuit Judge  
 HON. HARLINGTON WOOD, JR., Circuit Judge  
 HON. WILLIAM J. JAMESON, Senior District Judge\*

No. 77-1138

HELENE CURTIS INDUSTRIES, INC.,  
*Plaintiff, Counterdefendant, Appellant,*

*vs.*

CHURCH & DWIGHT, CO., INC., *et al.*,  
*Defendants, Counterplaintiffs, Appellees.*

On Petition for Rehearing

## ORDER

On the Court's own motion, the order heretofore entered in the above entitled cause on September 30, 1977, is hereby withdrawn.

\* The Hon. William J. Jameson, United States Senior District Judge for the District of Montana, is sitting by designation.

It is further ordered that the petition for rehearing filed in this cause by Helene Curtis Industries, Inc., is hereby denied, except that the published opinion of this Court is amended as follows:

On the first line of Page 18, the word "summary" shall be deleted and replaced with the word "final." On the fourth line of Page 18, the word "trial" shall be deleted and replaced with the words "further proceedings."

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause, no judge in active service has requested a vote thereon,\* and all of the judges on the original panel have voted to deny a rehearing. Accordingly, it is further ordered that the aforesaid petition for rehearing be, and the same is, hereby DENIED in all other respects.

\* The Hon. Walter J. Cummings disqualified himself from any consideration of the petition for rehearing and suggestion for rehearing en banc in this matter.

**Answer of Defendant Church & Dwight Co., Inc.  
in No. 76 C 2235**

Defendant Church & Dwight Co., Inc. ("Church & Dwight") for its answer to the Complaint of Helene Curtis Industries, Inc. ("Curtis") states:

*Complaint ¶1.* Plaintiff Helene Curtis Industries, Inc. ("Curtis") is a corporation organized and existing under the laws of the State of Illinois with its principal office and place of business situated in the City of Chicago. Curtis is engaged in the manufacture and sale of cosmetics throughout the United States and in many foreign countries. Beginning in the year 1975 Curtis began to manufacture, advertise and distribute an aerosol deodorant under the trademark "Arm In Arm"; the active deodorizing ingredient in Arm In Arm is sodium bicarbonate, known to the public as baking soda.

*Answer ¶1.* Church & Dwight admits the allegations of Paragraph 1 of the Complaint.

*Complaint ¶2.* Defendant Church & Dwight Co., Inc. ("C&D") is a corporation organized and existing under the laws of the States of Delaware with its principal office and place of business situated in the State of New York. C&D is a manufacturer and marketer of consumer products, largely sodium bicarbonate based, which are sold in consumer markets under the registered trademark "Arm & Hammer" and are also sold to industrial customers as an ingredient used in a variety of other manufacturing processes. C&D's consumer products are distributed through-

**Answer of Church & Dwight in No. 76 C 2235**

out a network of approximately 88 independent food brokers and 50 public warehouses located throughout the United States. The company's revenues from the sale of sodium bicarbonate for the year 1975 were in excess of \$75 million, of which approximately 75% were derived from the sale of consumer products.

*Answer ¶2.* Church & Dwight admits the allegations of Paragraph 2 of the Complaint except that it denies that its consumer products are distributed through a network of approximately 88 independent food brokers and that the company's revenues from the sale of sodium bicarbonate for the year 1975 were in excess of \$75 million dollars, of which approximately 75% were derived from the sale of consumer products.

*Complaint ¶3.* Defendant Allied Chemical Corporation ("Allied") is a corporation organized and existing under the laws of the State of New York with its principal office and place of business situated in the State of New York. Allied is a large, diversified producer of chemicals, fibers and fabricated products, and petroleum, coal, coke and other energy products. It does business directly and through subsidiaries throughout the United States and in many foreign countries. In the year 1975, Allied's gross revenues were in excess of \$2.33 billion, of which approximately half was derived from the sale of various chemicals.

*Answer ¶3.* Church & Dwight admits that defendant Allied Chemical Corporation ("Allied") is a corporation organized and existing under the laws of the State of New

*Answer of Church & Dwight in No. 76 C 2235*

York, that Allied is a producer of chemicals and other products, and that Allied does business throughout the United States and in foreign countries, but Church & Dwight is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 3 of the Complaint, except that Church & Dwight denies that Allied's principal office and place of business is situated in the State of New York.

*Complaint ¶4.* Curtis files this Complaint and invokes the jurisdiction of this Court under the provisions of sections 4 and 16 of the Act of Congress of October 15, 1914 (15 U.S.C. §§15 and 26), commonly known as the Clayton Act, to recover treble damages for injuries sustained by it resulting from violations of sections 1 and 2 of the Act of Congress of July 8, 1890, as amended (15 U.S.C. §§1, 2), commonly known as the Sherman Act, and to prevent and restrain continuing violation by the defendants of such Act.

*Answer ¶4.* Church & Dwight admits that this Court has subject matter jurisdiction over the Complaint and that the Complaint purports to state a claim to recover treble damages and for injunctive relief based on alleged violations of the antitrust laws, but Church & Dwight denies any violation of the antitrust laws as alleged or otherwise.

*Complaint ¶5.* Both of the defendants maintain an office, have an agent, transact business, and are found within the Judicial District of the Northern District of Illinois (15 U.S.C. §§22).

*Answer of Church & Dwight in No. 76 C 2235*

*Answer ¶5.* Church & Dwight admits the allegations of Paragraph 5 except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that Allied maintains an office, has an agent, transacts business, and is found within the Judicial District of the Northern District of Illinois.

*Complaint ¶6.* Venue is laid in this Judicial District since many of the unlawful acts done pursuant to the unlawful combination and conspiracy and attempt to monopolize complained of herein were performed within the State of Illinois, and the interstate trade and commerce described in this complaint is carried on, in part, within this Judicial District.

*Answer ¶6.* Church & Dwight admits that venue is properly laid in the Northern District of Illinois and that the interstate trade and commerce described in the Complaint is carried on in part within the Northern District of Illinois, but Church & Dwight otherwise denies the allegations of Paragraph 6 of the Complaint.

*Complaint ¶7.* Baking soda has a great variety of uses for household cleaning, deodorizing and baking purposes. It is also used as an antacid, as a dentifrice and as an ingredient in various other health and beauty applications. C&D's registered trade mark, Arm & Hammer, under which it advertises and sells baking soda to the consuming public has been used by C&D for over 100 years. Arm & Hammer baking soda is, and for many years last past has been, the only packaged baking soda sold at retail throughout the



*Answer of Church & Dwight in No. 76 C 2335*

United States to the consumer. C&D also uses its Arm & Hammer trade mark on various consumer products such as laundry detergent, washing soda, borax, oven cleaner and personal deodorant. Because of C&D's use of its Arm & Hammer trademark the public believes that all such products contain baking soda as a principal ingredient.

*Answer ¶7.* Church & Dwight admits the allegations of Paragraph 7 of the Complaint except that it denies that "ARM & HAMMER" Baking Soda is, and for many years last past has been, the only packaged baking soda sold at retail throughout the United States to the consumer and that because of its use of its "ARM & HAMMER" trademark the public believes that all such products contain baking soda as a principal ingredient.

*Complaint ¶8.* The production and distribution of baking soda for retail purchase by consumers throughout the United States and in various states is a line of commerce or relevant product market ("the consumer market") for purposes of application of the Clayton Act and the Sherman Act. The production and distribution of consumer products which contain baking soda as a principal ingredient or which the public has been led to believe contain baking soda as a principal ingredient, such as the products enumerated in paragraph 7 preceding, comprise relevant consumer submarkets. C&D controls 100% of the consumer market for baking soda, as defined herein, and has a significant foothold in the aforesaid consumer submarkets.

*Answer ¶8.* Church & Dwight denies the allegations of Paragraph 8 of the Complaint.

*Answer of Church & Dwight in No. 76 C 2335*

*Complaint ¶9.* For many years last past, the exact date being unknown to plaintiff, C&D has attempted to monopolize, has conspired to monopolize and has monopolized the consumer market for baking soda and has attempted to monopolize and conspired to monopolize various consumer submarkets, and has combined and conspired to restrain, and has restrained trade and commerce in such market and submarkets; such attempt to monopolize, conspiracy to monopolize and monopolization and such combination and conspiracy in restraint of trade has been effectuated and carried out over a period of years by C&D in part, as hereinafter averred.

*Answer ¶9.* Church & Dwight denies the allegations of Paragraph 9 of the Complaint.

*Complaint ¶10.* C&D entered into a series of long term exclusive dealing contracts with Allied for the purpose and with the intent of controlling and limiting the supply of baking soda available for sale in the consumer market, both nationally and in various parts of the United States; Allied has combined and conspired with C&D, and has aided and abetted C&D in carrying out and effectuating such unlawful conduct, by means of the aforesaid contracts pursuant to which it supplies C&D with a major and indispensable ingredient for C&D's production of baking soda.

*Answer ¶10.* Church & Dwight denies the allegations of Paragraph 10 of the Complaint except that it admits that it has and has had contractual relations with Allied, the terms and conditions of which speak for themselves.



*Complaint ¶10(A).* C&D produces a substantial portion of its own requirements of baking soda at a plant operated by it in Green River, Wyoming. The basic raw materials for the production of sodium bicarbonate are soda ash and natural gas (from which carbon dioxide is produced for use in the manufacturing process). Allied, which has an adjacent facility, supplies C&D with its entire requirements of soda ash under a long term contract continuing until 1989 with options to renew thereafter.

*Answer ¶10(A).* Church & Dwight admits that it produces baking soda at a plant operated by it in Green River, Wyoming; that the raw materials for the production of sodium bicarbonate are soda ash and natural gas, from which carbon dioxide is produced; and that Allied supplies Church & Dwight with soda ash pursuant to a contract, the terms and conditions of which speak for themselves, but Church & Dwight otherwise denies the allegations of Paragraph 10(A) of the Complaint.

*Complaint ¶10(B).* At Syracuse, New York, C&D is supplied with baking soda under a long term soda ash conversion contract with Allied, which bags and ships material to C&D's industrial customers and provides C&D's Syracuse plant with product which C&D packages in its own plant and ships to customers in consumer markets; this agreement extends until 1979 and from year to year thereafter, subject to either party's right to terminate on five years notice. The Syracuse agreement is the latest in a series of long term agreements between C&D and its predecessors and Allied and its predecessors, extending back to 1896 and providing for exclusive dealing between the parties for the sale and purchase of soda ash.

*Answer of Church & Dwight in No. 76 C 2235*

*Answer ¶10(B).* Church & Dwight admits that at Syracuse, New York, Allied supplies Church & Dwight with baking soda under a tolling agreement, the terms and conditions of which speak for themselves, which agreement expires in 1980, and, on information and belief, that Allied and Church & Dwight have had contractual dealings in relation to baking soda since 1896, but Church & Dwight otherwise denies the allegations of Paragraph 10(B) of the Complaint.

*Complaint ¶11.* C&D has engaged in marketing practices and pricing practices in the distribution of its Arm & Hammer baking soda which were intended to have the result, and succeeded in the result, that no other brand of baking soda is sold at retail to the consuming public anywhere in the United States; all competition and potential competition has been effectively suppressed and eliminated.

*Answer ¶11.* Church & Dwight denies the allegations of Paragraph 11 of the Complaint.

*Complaint ¶12.* C&D has maintained unreasonably high, excessive, monopolistic and non-competitive prices for the sale and resale of baking soda in the consumer market both nationally and in various parts of the United States, and has excluded competition in all markets.

*Answer ¶12.* Church & Dwight denies the allegations of Paragraph 12 of the Complaint.

*Complaint ¶13.* C&D has advertised and promoted its registered trade mark "Arm & Hammer" in a manner in-

*Answer of Church & Dwight in No. 76 C 2235*

tended to implement and reinforce its attempted monopolization of the consumer market for baking soda and relevant consumer submarkets in that it has sought to create, and has succeeded in creating, an identity in the public mind between "baking soda" and C&D ("Arm & Hammer").

*Answer ¶13.* Church & Dwight denies the allegations of Paragraph 13 of the Complaint.

*Complaint ¶14.* C&D has used its Arm & Hammer trade mark on various consumer products that contain baking soda as a principal ingredient, or which the public has been led to believe contain baking soda as a principal ingredient, such as laundry detergent, washing soda, borax, oven cleaner and personal deodorant in such manner as to reinforce the identity in the public mind of the term Arm & Hammer not only with baking soda as such but each and every consumer product that contains baking soda, with the intent and purpose of attempting to monopolize trade and commerce in all such baking soda containing products.

*Answer ¶14.* Church & Dwight denies the allegation of Paragraph 14 of the Complaint except that Church & Dwight admits that it has used its "ARM & HAMMER" trademark on consumer products, some of which contain sodium bicarbonate as a principal ingredient and some of which do not, which consumer products include baking soda, laundry detergent, washing soda, borax, oven cleaner, and personal deodorant.

*Answer of Church & Dwight in No. 76 C 2235*

*Complaint ¶15.* C&D instituted an action for trade mark infringement in the United States District Court at Rochester, New York against Curtis and others respecting use of the word "arm" in the sale by Curtis of its "Arm In Arm" deodorant; such action was instituted ostensibly to enforce C&D's Arm and Hammer mark but in actual fact (i) the action was not a good faith or reasonable effort to prevent real or threatened trade deception or confusion as to the source of Arm In Arm deodorant, and (ii) the action was, and continues to be, an attempt by C&D to prevent Curtis and others from entering the market for the sale of consumer products containing baking soda and was instituted, and continues to be pressed, with the intention and for the purpose of implementing and reinforcing C&D's monopolization of the consumer market for baking soda and C&D's attempt to monopolize the sale of other consumer products containing baking soda or which the public believes contain baking soda.

*Answer ¶15.* Church & Dwight denies the allegations of Paragraph 15 of the Complaint, except that it admits that it instituted an action for trade mark infringement and related claims in the United States District Court in Rochester, New York, which action is now pending in this district as Civil Action No. 76 C 4398.

*Complaint ¶16.* As part of the aforesaid scheme and device, and after C&D instituted the aforesaid trade mark infringement action against Curtis, and after C&D learned of the sale by Curtis of Curtis' Arm In Arm deodorant,

*Answer of Church & Dwight in No. 76 C 2235*

C&D also began the sale of a deodorant containing baking soda to which it affixed its Arm & Hammer trade mark.

*Answer ¶16.* Church & Dwight denies the allegations of Paragraph 16 of the Complaint except that it admits that in June 1975, it began the sale of its "ARM & HAMMER" brand deodorant, the planning for which had been in progress since a date long prior to Curtis' introduction of its "ARM IN ARM WITH BAKING SODA" deodorant.

*Complaint ¶17.* The aforesaid acts and conduct of defendants C&D and Allied have had the following effects, among other effects:

*Complaint ¶18.* C&D and Allied have conspired to attempt to monopolize the consumer market for baking soda throughout the United States and in various geographical areas thereof and have restrained trade and commerce in such market in the United States and in various geographical areas thereof.

*Answer ¶17 & ¶18.* Church & Dwight denies the allegations of Paragraphs 17 & 18 of the Complaint.

*Complaint ¶19.* C&D has attempted to monopolize and has monopolized the consumer market for baking soda and various consumer submarkets throughout the United States and in various geographical areas thereof and has restrained trade and commerce in such market and submarkets in the United States and in various geographical areas thereof.

*Answer of Church & Dwight in No. 76 C 2235*

*Answer ¶19.* Church & Dwight denies the allegations of Paragraph 19 of the Complaint.

*Complaint ¶20.* C&D has fostered and caused confusion among the purchasing public and has reinforced its unlawful consumer market control over baking soda by successfully engendering and identification among the purchasing public between baking soda sold at retail and C&D's Arm & Hammer. C&D's monopoly over the consumer market for baking soda has led the consuming public to erroneously believe (i) that all baking soda is Arm & Hammer, and (ii) that all consumer products with Arm & Hammer trade mark are comprised substantially of baking soda.

By reason of the foregoing Curtis has sustained injury in its business and property and is threatened from day to day with continuing loss and damage.

*Answer ¶20.* Church & Dwight denies the allegations of Paragraph 20 of the Complaint.

**Affirmative Defenses to the Complaint**

As and for its affirmative defenses to the Complaint, Church & Dwight states:

21. The Complaint fails to state a claim upon which relief may be granted.

22. Curtis has not been injured in its business or property by reason of anything forbidden in the antitrust laws as alleged in the Complaint, Curtis has not suffered threat-



*Answer of Church & Dwight in No. 76 C 2235*

ened loss or damage by a violation of the antitrust laws as alleged in the Complaint, and Curtis therefore lacks standing to sue.

Wherefore, Church & Dwight prays:

A. That the Complaint herein be dismissed with prejudice and that judgment be entered in defendants' favor;

B. That costs of the action be assessed against Curtis;

C. That Curtis be ordered to pay the attorneys fees incurred by Church & Dwight in this action; and

D. That the Court grant Church & Dwight such further relief as it may deem just.

**Transcript of Proceedings, January 18, 1977,**

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, the 18th day of January, 1977, at the hour of 2:00 o'clock p.m.

. . .

[10] The Court: But counsel's argument is now, and I think it has merit, is that Helene Curtis, having combined Arm in Arm and baking soda and done a giant promotional effort here, has created the identification of Arm in Arm and baking soda with Arm & Hammer and created a lot of good will. If you just went to Arm in Arm without baking soda now you would be carrying over [11] the good will which, according to the finding I make today, you improperly obtained.

So, I've really answered my own question as to whether Arm in Arm would be now usable on a non baking soda product. I think it might have been ab initio, but I doubt that it is now.

. . .

[14] Mr. Goldsmith: Now, the only reason that there could be any confusion is that Church & Dwight and baking soda are synonymous, and if there has been any confusion in the marketplace, we say it's because of the fact that Church & Dwight is synonymous with baking soda and is known as baking soda, and any time that baking soda appears, people are going to make some association with Church & Dwight.

*Transcript of Proceedings, January 18, 1977*

The Court: That's the extreme argument. Your client didn't rely on that, your client relied on Arm & Hammer and took Arm out of the title to make sure there was that confusion.

• • •

[17] The Court: Well, Arm & Hammer may have an identification with baking soda, but it doesn't have any rights over it. So, Helene Curtis could market a baking soda deodorant, advertise the baking soda aspect of it all they want, as long as they eliminate the problem that arises basically from the use of the word "Arm."

I think the only thing you could do to satisfy it is leave your present label and change the words, "Arm in Arm," and I know that's a dramatic result and a drastic result.

Mr. Goldsmith: Effectively, Judge, it does put us out of business, because there's been about \$10 million worth of advertising behind it already.

I don't know exactly what the sales are.

The Court: That advertising and those sales were done at Helene Curtis' risk.

The next question is, suppose that I entered this order, what's in the pipeline, how much of this product is out on the shelves, and how many is on its way and in warehouses, and what do you do about that?

Mr. Goldsmith: I'm not exactly sure of that, your Honor. I would not want to answer that question and answer it incorrectly.

• • •

*Transcript of Proceedings, January 18, 1977*

[19] The Court: I've considered that, you made that argument in the pleadings that I have, and it's [20] my conclusion that the anti-trust counterclaim and the discovery in conjunction with it and the length of time that it would take does not have sufficient merit or relevance to the present issue to warrant my barring a preliminary injunction for the many months that it would take in order to develop and try that.

I think the case for the preliminary injunction has been made out, and I think it's been made out adequately, independently of the anti-trust counterclaim, and despite it.

• • •

**Transcript of Proceedings, February 17, 1977**

[19] *Cross-Examination by Mr. Goldsmith:*

Q. Mr. Staniar, how big is the antiperspirant deodorant market? A. It is roughly, I believe, about half a billion.

Q. What percentage of that market does Church & Dwight have? A. Roughly, 2 per cent.

Q. What per cent did it have a year ago? A. About the same.

**C & D Documents P11394-P11396, March 12, 1973**

[LETTERHEAD OF]

**CHURCH & DWIGHT CO., INC.**

Two Pennsylvania Plaza, New York, N.Y. 10001

Phone (212) 868-2900

March 12, 1973

Mr. David R. Foster  
President and Chief Executive Officer  
Colgate-Palmolive Company  
300 Park Avenue  
New York, N.Y. 10022

Dear Mr. Foster:

We have just seen the packaging for your company's new "PEAK TOOTHPASTE with BAKING SODA." As you know, we have supplied at least some of that baking soda ingredient.

We are disturbed by your prominent use of the circular band on which the words "with BAKING SODA" are shown. Your circular band display bears a striking similarity to the circular band which has long been associated with our company's well-known ARM & HAMMER baking soda. The circular band display appears (in semi-circle form) four times on your carton and twice on the tube itself; it also appears (in quarter-circle form) on each end of the carton.

I am sure you are familiar with our ARM & HAMMER marks for baking soda, and with our long-established way of displaying these marks together with our circular band mark, as shown by the enclosed sample of our current pack-



*C & D Documents P11394-P11396, March 12, 1973*

age. The circular band has been a distinctive feature of our ARM & HAMMER baking soda package for more than a century.

The circular band mark is the subject of a number of U.S. trademark registrations, which cover the circular band alone and also in combination with the ARM & HAMMER marks. I enclose copies of two such registrations, Nos. 59, 574 and 507, 295 of our circular band mark for baking soda (also called bicarbonate of soda and saleratus).

I also enclose extracts from a decision by the U.S. Court of Appeals for the Eighth Circuit in *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 24 (1910). The Court in that case held that our company "had the undoubted right to the exclusive use of this annular [circular] band as a trade-mark upon baking soda and baking powder after 1896" (p. 32). Our rights have been reinforced by more than 6 years' use of the circular band mark since we obtained that adjudication of our "undoubted right" to its exclusive use.

Your company's use of a circular band to display the words "with BAKING SODA" on your new baking soda dentifrice is so strongly suggestive of the circular band mark identified with our company's baking soda that we are sure it will cause confusion and impair our trademark rights. In this connection, our ARM & HAMMER baking soda has been extensively promoted and sold as a dentifrice for many years (see for example the instructions on the enclosed package).

It seems to us that it should be a matter of mutual concern to both our companies to avoid confusion of our busi-

*C & D Documents P11394-P11396, March 12, 1973*

nesses and products. We are a small company. Baking soda is our main product, and the group of trademarks we have been using since 1869 to identify this product represent a principal asset of our company. We scrupulously respect the trademark rights of others and we expect others to afford our trademark rights similar respect. In view of the important trademark which are owned and used by your company, I trust that you will understand our grave concern.

We have no objection, of course, to your use of the words "with BAKING SODA", not displayed in a circular band. But I hope we may expect your cooperation in modifying your packaging to eliminate the semi-circle and quarter-circle bands.

Surely there are other forms of art work which can serve your purposes just as effectively, and without creating confusion with our circular band mark. For example a peaked chevron device, suggestive of your PEAK product designation, could serve the same purpose as the circular band now used on both your product and ours.

I look forward to having your early assurances that we may expect your cooperation in promptly phasing out the circle motif.

Very truly yours,

/s/ DWIGHT C. MINTON  
Dwight C. Minton

DCM:bw  
Enclosures

**C & D Document P11402, March 30, 1973**

[LETTERHEAD OF]

**COLGATE-PALMOLIVE COMPANY**  
300 Park Avenue  
New York, N.Y. 10022

March 30, 1973

Mr. Dwight C. Minton, President  
Church & Dwight Co., Inc.  
520 Pennsylvania Plaza  
New York, New York 10001

Dear Mr. Minton:

I have your letter of March 12, 1973 with respect to our new product, PEAK TOOTHPASTE with Baking Soda.

At the present time our Art Department is developing a new design for our package and we would expect to use the new design just as soon as we have exhausted our current packages. PEAK is now being sold in three test markets and before expanding into other territories, we will have a new package. In developing the new design we will certainly take into consideration your comments regarding your own package and your belief that there might be some confusion in the minds of the public if we were to continue to use a circular band mark.

Sincerely,

/s/ DAVID R. FOSTER  
David R. Foster

**C & D Document P11403, April 4, 1973**

[LETTERHEAD OF]

**CHURCH & DWIGHT CO., INC.**  
Two Pennsylvania Plaza, New York, N.Y. 10001  
Phone (212) 868-2900

April 4, 1973

Mr. David R. Foster, President  
Colgate-Palmolive Company  
300 Park Avenue  
New York, New York 10022

Dear Mr. Foster:

Thank you for your letter of March 30 and your prompt attention to our problem.

We appreciate the action you have taken in this respect, and hope that your venture is a success inasmuch as we are a supplier of the sodium bicarbonate used in PEAK toothpaste.

Sincerely,

/s/ DWIGHT C. MINTON  
Dwight C. Minton

DCM:bt

**Watt Exhibit 80, May 8, 1975**

[LETTERHEAD OF]

**CHURCH & DWIGHT CO., INC.**

Two Pennsylvania Plaza, New York, N.Y. 10001  
Phone (212) 868-2900

May 8, 1975.

Mr. Walter S. Kaplan  
Helene Curtis Industries Inc.  
4401-31 W North Avenue  
Chicago Illinois 60639

Dear Mr. Kaplan:

We have just seen your company's new product "ARM IN ARM With Baking Soda". We are disturbed by your use of "ARM", the identical first word of our well-known ARM & HAMMER trademark; and with your using as a connecting word with "ARM" the term "IN" which is phonetically the same as the connecting "&" in our trademark. The combined use of these elements of our trademark in conjunction with the prominent display of the words "With Baking Soda", cannot fail, we believe, to lead to confusion. Moreover, your failure to identify your product explicitly as a deodorant overemphasizes its baking soda content and adds to the likelihood of consumer confusion.

I am sure you are familiar with our ARM & HAMMER trademark, which has been used as a mark for our Baking Soda for more than a century, and which is now being used for a broad range of products. I am sure you are also familiar with our extensive promotion of the deodorant qualities of Baking Soda in numerous applications.

*Watt Exhibit 80, May 8, 1975*

It seems to us that it should be a matter of mutual concern to both our companies to avoid confusion of our businesses and products. We scrupulously respect the trademark rights of others, and we expect others to afford our trademark rights similar respect. In view of the important trademarks which are owned and used by your company, I trust you will understand our grave concern.

We have been using the ARM & HAMMER trademark since 1869 and consider this mark to be one of the principal assets of our company. In view of the great value to us of ARM & HAMMER as a important and well respected trademark, it is our firm policy to take every possible step to preserve that value.

Mr. Walter S. Kaplan  
Helene Curtis Industries Inc.

May 8, 1975.

Of course we have no objection to your use of baking soda in your deodorant, or the label identification of baking soda as an ingredient of your product but we cannot believe that it is necessary to use "ARM" or "ARM IN ARM" to identify your product. Surely there are other words which can serve your purposes just as effectively, and without creating the confusion we believe is inevitable in your use of the words "ARM IN ARM" for your new product.

I look forward to having your early assurances that we may expect your co-operation in promptly finding a more appropriate mark for your new deodorant product.

Very truly yours,

/s/ DWIGHT C. MINTON  
Dwight C. Minton



Watt Exhibit 81, May 12, 1975

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2128668900 TOMT NEW YORK NY 83 05-12 12328 EST  
PMS WALTER S KAPLAN HELENE CURTIS INDUSTRIES  
INC, DLR

4401-31 WEST NORTH AVE  
CHICAGO IL 60639

DEAR MR KAPLAN

PLEASE REFER TO MY LETTER TO YOU DATED MAY 8 1975. WE HAVE NOW SEEN YOUR STANDARD-SIZE CONTAINERS OF LIGHTLY SCENTED ARM IN ARM DEODORANT AND YOUR SHELF STRIP, BOTH OF WHICH UTILIZE THE RED AND YELLOW COLOR COMBINATION TRADITIONALLY USED FOR OUR ARM AND HAMMER PRODUCTS, USE OF THESE COLORS IN COMBINATION WITH OTHER ELEMENTS OF OUR TRADEMARK INCREASES OUR CONVICTION THAT WIDESPREAD CONSUMER CONFUSION WILL BE INEVITABLE.

WE URGENTLY REQUEST YOUR EARLY RESPONSE.

VERY TRULY YOURS

DWIGHT C MINTON CHURCH AND DWIGHT CO INC  
12:32 EST  
MGMNYAT MSB

Pawlick Exhibit 86, May 12, 1975

[LETTERHEAD OF]

HELENE CURTIS INDUSTRIES, INC.  
4401 W. North Avenue, Chicago, Illinois 60639  
Phone 292-2121

May 12, 1975

Mr. Dwight C. Minton  
Church & Dwight Co., Inc.  
Two Pennsylvania Plaza  
New York, New York 10001

Dear Mr. Minton:

As in your company, Mr. Milton, Helene Curtis is very careful about our trademarks and about the trademarks of other companies. When a new mark is chosen, our outside trademark counsel are asked to make a complete trademark search.

When we were choosing the name "Arm-In-Arm", we obviously considered the possibility of confusion with the trademarks of other companies. It was (and is) the opinion of our counsel that "Arm-In-Arm" does not infringe your mark "Arm & Hammer".

We are sorry you are disturbed about our use. We do not feel a buyer will be misled, however, particularly since the packaging is so dissimilar and our mark is for a personal deodorant while yours is for goods in a different field.

Very truly yours,

HELENE CURTIS INDUSTRIES, INC

/s/ WALTER KAPLAN  
Walter Kaplan  
President

WK/1b

**Watt Exhibit 90, April 15, 1976**

April 15, 1976

Dave Gordon  
Helene Curtis

Dear Dave:

I just got through talking with Curt Scarborough who filled me in on some of the details with regard to the Shower to Shower Deodorant Spray with Baking Soda.

As you know, the markets involved are: Houston, Dallas/Ft. Worth, and Denver. Shipment will be made this month with advertising presumably starting in mid May. Commercials may be similar to the attached which was used in tests in Buffalo and Weston, W. Va. with no product being distributed. We are attempting to get further information on the intensity of the advertising from media in these markets.

The product comes in three sizes: 5 oz., 8 oz., and 12 ounce with the following claims made on the back:

- Fights underarm odor for 24 hours because its baking soda powder actually absorbs and neutralizes odor.
- Sprays on dry—is not cold or chilly.
- Won't stain your clothing.
- A clean fresh fragrance that is pleasing to the whole family.

In view of this new competition, it would seem desirable to take some retaliatory action with: (a) additional TV

**Watt Exhibit 90, April 15, 1976**

advertising weight; (b) special trade allowances that will insure broad distribution of at least four items in each of the major stores and adequate backup stock.

The additional advertising might initially involve use of the current commercial. Or we might want to consider producing another version that sold Arm In Arm competitively as *the* superior baking soda product. If we did the later we would of course be in a position to know the best way to operate if, as and when Johnson & Johnson goes national.

Let's discuss.

Cordially,

/s/ BILL  
William J. Watt

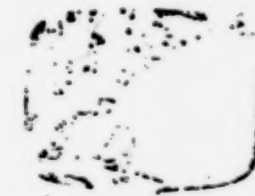
cc A. Pawlick  
C. Cooper  
J. Zwiren

Jim Riley - Bill Watt - Hugh Wells - For Your Life

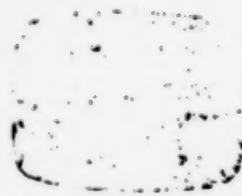
# Radio TV Reports

41 East 42nd Street New York N.Y. 10017  
(212) 697-5100

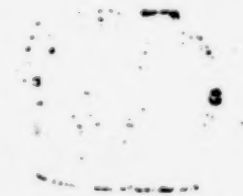
|                    |   |                      |                               |
|--------------------|---|----------------------|-------------------------------|
| PRODUCT<br>PROGRAM | SHOWER TO SHOWER<br>DRY SPRAY DEODORANT<br>MAUDE<br>WDTV-TV | 11/17/75<br>(WESTON) | WS7E1217<br>30 SEC.<br>9:42PM |
|--------------------|---|----------------------|-------------------------------|



1. JMAN: I don't hide underarm odor any more.



2. 'Cause new Shower to Shower Dry Spray Deodorant has baking soda.



3. CHORUS: You don't have to worry any more, oh, no.



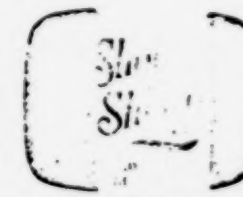
4. You're more secure than ever before. Oh, yeah.



5. 'Cause you've got nothing to hide



6. when you're using Shower to Shower.



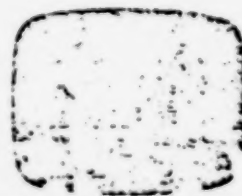
7. ANNCR: New Shower to Shower Dry Spray



8. with baking soda



9. absorbs and neutralizes odor before it happens.



10. CHORUS: You've got nothing to hide



11. when you're using Shower to Shower.

n009193

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